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IN THE

Supreme Court of the United States

October Term, 1957

No. 601

NORTH AMERICAN AVIATION, INC., a Corporation,

Petitioner,

vs.

WARDA LEE HOOKER AND RAYMOND E. HOOKER, a Minor, by His Guardian ad Litem, Harold Sorgen,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

PAGE

I.

Every one of the questions presented to the Supreme Court by petitioner in its petition for certiorari has a false premise..... 1

II.

Petitioner's statement which purports to be a statement of fact, is very substantially erroneous..... 3

III.

Writ of certiorari should be ref[illegible]ed because the case does not involve questions of public importance..... 9

IV.

Petitioner's arguments in support of reasons for granting writ of certiorari are without sound legal foundation..... 10

A. The doctrine of manufacturer's liability as recognized by California law has neither been disregarded nor extended by the decision of the Court of Appeals..... 10

B. There is no conflict between the opinion of the United States Courts of Appeals and the California decisions involving the doctrine of res ipsa loquitur..... 11

1. It is for the jury to determine whether each of the conditions necessary to bring into play the doctrine of res ipsa loquitur is present..... 12

2. The doctrine of res ipsa loquitur may be relied upon to support a judgment although no jury instruction is given..... 13

3. The accident was of a kind which does not occur in the absence of someone's negligence..... 13

4. The condition requiring exclusive control in defendant is satisfied..... 14

PAGE

5. The accident could not have been due to any voluntary action or contribution on the part of the deceased pilot 15

6. There was no evidence of possible non-negligent pilot error 16

C. The decision of the Court of Appeals does not conflict with the decisions of other circuits on the application of res ipsa loquitur 19

D. The verdict was fair and just and supported by substantial evidence 20

Conclusion 22

TABLE OF AUTHORITIES CITED

CASES	PAGE
Baker v. Goodrich Co., 115 Cal. App. 2d 221, 252 P. 2d 24	14
Bauer v. Otis, 133 Cal. App. 2d 443, 284 P. 2d 133	13
Boise Payette Lumber Co. v. Larsen, 214 F. 2d 373	19
Burr v. Sherwin-Williams Co., 42 Cal. 2d 682, 268 P. 2d 1041	14
Cohn v. United Air Lines Trans. Co., 17 Fed. Supp. 685	20
Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P. 2d 436	14, 16
Fields v. Oakland, 137 Cal. App. 2d 602; 291 P. 2d 145	14
General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175, 82 L. Ed. 1273, 58 S. Ct. 849	9
Hoffing v. Coca-Cola Bottling Co., 87 Cal. App. 2d 371, 197 P. 2d 56	14
Jaffke v. Dunham, 352 U. S. 285, 1 L. Ed. 2d 314	13
La Porte v. Houston, 33 Cal. 2d 167, 199 P. 2d 665	14
Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916	22
Layne and Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387, 67 L. Ed. 712	10
Liggett and Myers Tobacco Co. v. De Lape, 109 F. 2d 598	15
Magnum Import Co. v. DeSpoturno Coty, 262 U. S. 159, 163 L. Ed. 922	10
McPherson v. Buick Motor Company, 217 N. Y. 382, 111 N. E. 1050	10, 20
Michener v. Hutton, 203 Cal. 604, 265 Pac. 238	15
Morrison v. LeTourneau Co. of Georgia, 138 F. 2d 339	19
National Labor Relations Board v. Pittsburgh Steamship Co., 340 U. S. 498, 95 L. Ed. 479	9
Nungary v. Pleasant Valley etc. Assn., 142 Cal. App. 2d 653, 300 P. 2d 285	14
O'Rourke v. Day and Night Water Heater Co., 31 Cal. App. 2d 364	21

PAGE

Parker v. Granger, 4 Cal. 2d 668, 52 P. 2d 226 19

Rogers v. Los Angeles Transit Lines, 45 Cal. 2d 414, 289 P. 2d 226 13

Rohar v. Osborne, 133 Cal. App. 2d 345, 284 P. 2d 125 14

Rose v. Melody Lane, 39 Cal. 2d 481, 247 P. 2d 335 13

Rui v. Sioux City Cemetery, 349 U. S. 70, 99 L. Ed. 897 10

Seneris v. Haas, 45 Cal. 2d 811, 291 P. 2d 915 ..... 12, 15

Sloboden v. Times Oil Co., 145 Cal. App. 2d 197, 302 P. 2d 34 .. 11

Smith v. Alaska Airways, 89 F. 2d 253 19

Smith v. O'Donnell, 215 Cal. 714, 12 P. 2d 933 19

Spencer v. Beatty Safway Scaffold Co., 141 Cal. App. 2d 875, 297 P. 2d 746 15

Sullivan v. Shell Oil Company, 234 F. 2d 733 7

Tennant v. Peoria and P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520 8

United States v. Johnson, 268 U. S. 222, 69 L. Ed. 925 9

Williams v. United States, 218 F. 2d 473 19

Zentz v. Coca-Cola Bottling Co., 39 Cal. 2d 436, 247 P. 2d 344 ..... 12, 14

STATUTES

California Code of Civil Procedure, Sec. 1961 17

California Code of Civil Procedure, Sec. 1963 15

TEXTBOOKS

37 California Law Review, pp. 183, 194-198, Prosser, Res Ispsa Loquitur in California 12

65 Corpus Juris Secundum, p. 629 ..... 10, 20

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Every One of the Questions Presented to the Supreme Court by Petitioner in Its Petition for Certiorari Has a False Premise.

It has been Petitioner's consistent policy to ignore all of the evidence which conflicts with Petitioner's interests. Although the evidence of negligence in manufacture has been specifically pointed out by Respondents twice in briefs and also in oral argument, Petitioner prefers to pretend that it is not there, as in question number 1. Since the jury could and did conclude from this evidence that Petitioner was negligent, Petitioner's hope is that some appellate court will reweigh the evidence and come to a contrary conclusion, as suggested in question number 3.

As far as the law is concerned, the United States Court of Appeals simply decided that the evidence on all questions was conflicting, but sufficient to sustain the verdict. This is not an innovation in any field of the law, as assumed in question number 2. It does not conflict with the decisions of the Courts of California or with those of other Courts of the United States. It will be of little or no value as a precedent.

In order to pose legal issues on appeal, Petitioner has erected a straw man in question number 5 by supposing that the judgment has been sustained by application of the doctrine of *res ipsa loquitur*. There is no room for speculation as to the law applied because the Court of Appeals held that there was substantial evidence to support Respondents' theory that the crash was due to "a defect in the manufacture of the airplane, *for which Petitioner was responsible.*" (Emphasis added.)

The Court of Appeals held that there *was* substantial evidence that mechanical defect caused the crash. This does not leave the uncertainty which is the false premise of question number 4. There is nothing to indicate that the Court of Appeals did not give full consideration to every authority cited and every argument made before it, as assumed in question number 6. The guarantee of due process of law does not require the Court of Appeals to discuss arguments of counsel in an opinion or even to write an opinion.

The Court of Appeals noted in its decision (page 7 of the Appendix to Petition for Certiorari) that the four questions presented to that Court by Petitioner boiled down to one which was whether the evidence sustained the verdict of the jury. The Court of Appeals held that it did. The questions now presented to the Supreme Court

are subject to the same analysis and, therefore, fall into a category of cases which the Supreme Court has long since refused to review.

II.

Petitioner's Statement Which Purports to Be a Statement of Fact, Is Very Substantially Erroneous.

Until First Lieutenant Hughes stepped into the cockpit of the plane, it had been under the exclusive control of the manufacturer. Petitioner manufactured the airplane, tested it for the Air Force accepted it for the Air Force [R. 313, 314, 320, 505]. The Army Air Force had inspectors on the premises, but on a surveillance basis down in the detail and major assembly departments, but not in the final assembly [R. 366-367]. This is important because an electrical fire occurred in the fuselage of the airplane in final assembly where there were no Air Force inspectors [R. 367]. Further reference to this incident appears below.

Petitioner's assertion that First Lieutenant Hughes had only 38 hours of instrument flying time is contrary to fact. In the Court of Appeals Petitioner stated that Lieutenant Hughes had 137 hours of instrument flying time (App. Op. Br. p. 4). Respondents agreed that this was correct and were then bitterly attacked in the Reply Brief of Petitioner. The 38 hour figure fails to take into account approximately 100 hours of instrument flying time credited to Lieutenant Hughes while he was in training. Exhibit 1 is a record of his flight experience and this shows a total of 132 hours and 25 minutes of instrument flight experience. The Court of Appeals correctly notes in its decision that Petitioner claimed that Lieutenant Hughes had 137 hours of instrument flying (see Ap-

pendix to Petition for Writ, p. 3). By way of comparison, it appears that test pilot Kinkella, a man of unquestioned competency, had 150 hours of instrument time [R. 540]. This attack on decedent's instrument flight experience is unconvincing.

The opinion of the Court of Appeals summarizes the conflict on the question of the pilot's experience (Appendix to Petition for Certiorari, p. 5). He flew 100 combat missions in jet aircraft in a foreign theatre [R. 103, 108, 132, 140] and had 144 hours of combat time [R. 143] and received decorations including the Distinguished Flying Cross and Oak Leaf Clusters [R. 108, 112]. Decedent acted under orders from the Army Air Force which would seem to be best qualified to judge his competency to do as he was ordered.

The debate on the pilot's experience is reduced to insignificance by Petitioner's concession that decedent was entitled to the presumption of due care (See Petitioner's Opening Brief in the Court of Appeals, pp. 35-37; and Petition for Certiorari, p. 16). Suffice it to say that the jury obviously did not find that inexperience caused the pilot' death and that the Court of Appeals found substantial evidence that the cause was mechanical failure.

The evidence is not "uncontradicted" that the weather was instrument weather (see Appendix to Petition for Certiorari, p. 6). Nine pages of text and Appendix in Respondents' brief in the Court of Appeals were devoted to discussion of the condition of the weather which Respondents pointed out was good at the time of the accident and normal for the Los Angeles Airport. The conflict in the evidence on this point was there pointed out with detailed reference to the record. The condition of the weather was a question for the jury. The deceased pilot

did have an instrument clearance for take-off, but it was pointed out by witnesses that instrument clearance would be required if instrument weather was expected at any point between the place of take-off and destination. Again, this conflict was for the jury to resolve and obviously the jury did not consider that the weather was responsible for the pilot's death.

Petitioner states the case most favorably to itself in saying that there was some conflict as to whether the plane exploded before or after it crashed. The evidence established a flame-out,[1] followed by an explosion in the air[2] and that the plane was afire in the air.[3] It is, therefore, not true that the evidence is "uncontradicted" that

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[1]The incident report which was admitted without objection reads:

"Subsequent reports from the City Operations personnel, from North American Aviation supervisors and from the City Fire Department personnel indicate the aircraft, a jet, had an apparent flame-out at approximately 100 feet altitude . . ."

Test Pilot Frank C. Smith testified:

". . . I lost sight of it in the fog, and we were returning back into the lounge area, and we heard the engine stop with an explosion immediately, and we looked out to the area and saw the black smoke coming up through the fog" [R. 524].

[2]Patrick H. Rogers testified:

"It was air-borne at the time I seen it, it was air-borne about 25 to 40 feet, and just—well, it hadn't even got to the end of the runway when there was a loud explosion and a big burst of flame, 25 to 40 feet off the runway" [R. 180].

[3]Patrick H. Rogers testified:

"The Court: When you first saw this airplane, you saw a flash?

The Witness: Just a great big ball of fire.

The Court: It was in the fog then, was it?

The Witness: It was air-borne in the fog" [R. 181].

Robert E. Callagy testified that when he first saw the plane it was air-borne and on fire [R. 186-187].

the plane caught fire after it crashed or that the pilot was then killed. The time of death of the pilot was not established and it is equally as possible that he was killed by the explosion in the air as by the crash to the ground.

The evidence was not "uncontradicted" that decedent did not operate the jet engine long enough to stabilize his instruments. The gyro horizon was the only instrument which needed to be stabilized and this required five minutes. Analysis of the testimony of the witnesses shows that not less than four minutes and forty seconds expired after the jet engine was turned on and before the plane started down the runway [R. 400, 406, 411, 414, 415, 425, 428]. The time necessary for the take-off supplies the balance of the required five minutes.

Furthermore, it was established that the gyro horizon was an *electrical* instrument which is not in any way dependent upon the running of the jet engine [R. 456]. On pages 10 and 11 of Respondents' brief in the Court of Appeals, Respondents pointed to the evidence in the record which showed that this instrument had time to stabilize.

Why doesn't Petitioner point out that there was an *electrical* fire in the fuselage of the plane in the course of manufacture? The evidence of this fact was as follows:

> "Q. . . . Would you go back to L-4? I overlooked a couple of items. Would you read No. 3 on that, 89, item 89 on that L-4? A. Due to use of foamite cleaner, it looks like, or due to use of foamite, clean all relay boxes and terminal connectors, such as reverse current relay, field current relay, armament relay, and so on.
>
> Q. What does that mean, Mr. Clayton? A. The only reason there would be any foamite in there would be if we had an electrical fire in the assembly.

Q. That means they had a fire there and put it out, isn't that right? A. It reads that way.

Q. Isn't that the final check-out sheet, squawk sheet, for the electrical system? A. No. This is down in the final assembly. This isn't the final squawk sheets of the airplane.

Q. This is the final assembly? A. That's right." [R. 810-811].

From the unexplained presence of this electrical fire and the callous indifference of the manufacturer's inspector (who did not require a check of the cause of the fire or a check of the wiring, but only that evidence of the fire be erased) and the fact of the accident itself,[4] the jury was warranted in concluding that Petitioner was careless in manufacturing the plane.

It is not true, as asserted by Petitioner, that Respondents were unable to point to negligence of Petitioner which was in any manner a proximate cause of the crash, or that there was no evidence pointing to a flaw in its manufacture. Again, on the contrary, the evidence does show a fault of inspection and manufacture and in a potent potential source of trouble. The wiring, if faulty, is likely to be responsible for malfunction of electrically operated fuel pumps causing a flame-out, and also for an electrical fire while the plane is in the air, igniting fuel or fumes to cause both explosion and fire in the air. Such substantial evidence, even if it is circumstantial, is evidence of negligence sufficient to support a jury verdict.

The trial court's instruction on the duty of a manufacturer of a potentially dangerous instrumentality was proper and the jury had the duty of weighing the circumstantial

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[4] *Sullivan v. Shell Oil Company* (C. A. 9, 1956), 234 F. 2d 733.

evidence submitted to it. The jury did determine that the manufacturer breached its duty. The Court of Appeals found that there was "substantial evidence" to support the verdict.

Whether the trial judge would have reached the same conclusion from the same evidence is of no consequence. Suffice it to say that regardless of his personnal appraisal of the evidence, he was steadfast in his judgment that there was sufficient evidence to go to the jury. Of all of Petitioner's quotations from comments of the trial judge, only one line is of real importance:

> "I don't feel justified in substituting my opinion for the opinion of the jury." [R. 878].

As this Court has said of the duty of both trial and appellate courts:

> "Courts are not free to set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."
>
> *Tennant v. Peoria and P. U. Ry. Co.* (1944), 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

The opinion of the Court of Appeals follows the law that the facts are for the jury to determine. The jury, having done so on substantial evidence, the result is not to be upset by the trial or appellate courts. The jury's conclusion is sound, reasonable and just. To ascertain the nature and character of the substantial evidence which supports the verdict, Petitioner has but to read the whole record, not just the testimony favorable to Petitioner.

III.

Writ of Certiorari Should Be Refused Because the Case Does Not Involve Questions of Public Importance.

As noted above, Petitioner is primarily interested in a review of conflicting evidence and all of the questions presented are predicated upon an assumption or assertion that there is no evidence to sustain the jury verdict. It has long been the declared policy of the Supreme Court to refuse to review a conflict or the sufficiency of the evidence.

N.L.R.B. v. Pittsburgh Steamship Co. (1951), 340 U. S. 498, 95 L. Ed. 479, 482, 483;

General Talking Pictures Corp. v. Western Electric Co. (1937), 304 U. S. 175, 178, 82 L. Ed. 1273, 1275, 58 S. Ct. 849;

United States v. Johnson (1925), 268 U. S. 222, 227, 69 L. Ed. 925, 926.

The questions of law which Petitioner asserts are involved do not appear from the decision itself, but are assumed by the Petitioner to underlie the decision. If such were the case, further review by the Supreme Court is only of importance to the parties to the litigation. The decision plainly states that the only question involved is the sufficiency of the evidence. No question of conflicting precedent is presented; so the case is entirely lacking in public interest or importance. The policy of the Supreme

Court not to grant certiorari in such cases is well stated in the following decisions:

Rutz v. Sioux City Cemetery (1954), 349 U. S. 70, 99 L. Ed. 897, 901;

Magnum Import Co. v. DeSpoturno Coty (1923), 262 U. S. 159, 163 L. Ed. 922, 924;

Layne and Bowler Corp. v. Western Well Works, Inc. (1922), 261 U. S. 387, 393, 67 L. Ed. 712, 714.

IV.

Petitioner's Arguments in Support of Reasons for Granting Writ of Certiorari Are Without Sound Legal Foundation.

A. The Doctrine of Manufacturer's Liability as Recognized by California Law Has Neither Been Disregarded Nor Extended by the Decision of the Court of Appeals.

Contrary to the contention of Petitioner, the Court of Appeals based its decision upon three factors: (1) There was substantial evidence that the accident which caused the pilot's death was caused by mechanical defect; (2) There was substantial evidence that this resulted from a defect in the manufacture of the airplane and (3) There was substantial evidence that Petitioner was responsible for this defect, which is to say that it was negligently responsible.

The law of manufacturer's responsibility in California is substantially the same as established in *McPherson v. Buick Motor Company* (1916), 217 N. Y. 382, 111 N. E. 1050, 65 C. J. S. 629. The principle is that if a manufactured article is the kind of article which will cause more than trivial harm if carelessly manufactured the manufacturer must use reasonable care in manufacturing

it. The Court said that there must be knowledge of danger, not merely possible, but probable.

This means that there must be knowledge that the article is the kind of thing which will be harmful if not carefully manufactured. Everyone knows that an airplane of any kind is such an article. Even Petitioner knows this.

Applying the law to this case, the question is whether Petitioner did exercise reasonable care in manufacturing the aircraft in question. This is a question of fact which the jury resolved against the Petitioner upon the evidence already noted.

Fairly appraised, the opinion of the Court of Appeals is not susceptible to any inference that the Court sanctioned holding Petitioner liable upon any ground except Petitioner's own negligence in the manufacture of the airplane.

B. There Is No Conflict Between the Opinion of the United States Court of Appeals and the California Decisions Involving the Doctrine of Res Ipsa Loquitur.

In some states it has been held that it is a question of law as to whether the circumstances do or do not warrant application of the doctrine of *res ipsa loquitur*. This is not the law of California.

The law of this State is well expressed in *Sloboden v. Times Oil Co.* (1956), 145 Cal. App. 2d 197, 302 P. 2d 34.

> "*Res ipsa loquitur* is based in great degree on probabilities; it is a simple, understandable rule of circumstantial evidence with sound background of common sense and human experiences rather than rigid legal formula designed largely for exclusionary purposes."

1. IT IS FOR THE JURY TO DETERMINE WHETHER EACH OF THE CONDITIONS NECESSARY TO BRING INTO PLAY THE DOCTRINE OF RES IPSA LOQUITUR IS PRESENT.

As stated by the California Supreme Court in the recent case of *Seneris v. Haas* (1955), 45 Cal. 2d 811, 291 P. 2d 915,

> ". . . The existence of the conditions upon which the operation of the doctrine is to be predicated is a question of fact and the right of the jury to find those facts must be carefully preserved. (citing cases.)"

The doctrine is applicable if it can be said that in the light of common experience or from evidence in the case, the accident was more probably than not the result of defendant's negligence. (*Zentz v. Coca-Cola Bottling Co.* (1952), 39 Cal. 2d 436, 247 P. 2d 344.) However:

> ". . . The conclusion that negligence is the most likely explanation of the accident, or injury, is not for the trial court to draw, or to refuse to draw so long as plaintiff has produced sufficient evidence to permit the jury to draw the inference of negligence even though the court itself would not draw that inference; the court must still leave the question to the jury where reasonable men may differ as to the balance of probabilities.
>
> "In order that a plaintiff be entitled to the benefit of the doctrine of *res ipsa loquitur*, he need not exclude every other possibility that the injury was caused other than by defendant's negligence." (Prosser, Res Ipsa Loquitur in California, 37 Cal. L. Rev. 183, 194-198.)

In *Bauer v. Otis* (1955), 133 Cal. App. 2d 439, 443, 284 P. 2d 133, the Court pointed out:

> "The inference of negligence is not required to be an exclusive or compelling one. It is enough that the court cannot say that reasonable men could not draw it."

2. The Doctrine of Res Ipsa Loquitur May Be Relied Upon to Support a Judgment Although No Jury Instruction Is Given.

Jaffke v. Dunham (1957), 352 U. S. 285, 1 L. Ed. 2d 314;

Rogers v. Los Angeles Transit Lines (1955), 45 Cal. 2d 414, 289 P. 2d 226;

Rose v. Melody Lane (1952), 39 Cal. 2d 481, 247 P. 2d 335.

3. The Accident Was of a Kind Which Does Not Occur in the Absence of Someone's Negligence.

The F80 jet plane delivered to Lt. Hughes was not an experimental model [R. 460, 479]. This particular type of plane had been manufactured by Petitioner for four years [R. 460]. Thousands had been delivered to the Army [R. 330]. A jet plane is no more dangerous than a prop plane [R. 325-326].

It is an extraordinary event for a jet to have a flame out, to explode or to burn upon take-off [R. 328, 469-470, 479, 626-627].

Test pilot Annis had flown three to four thousand flights in F80's without experiencing flame out on take-off or fire or explosion [R. 479]. He had never heard of a plane exploding during take-off [R. 469-470].

The case of *La Porte v. Houston* (1948), 33 Cal. 2d 167, 199 P. 2d 665, is distinguished from the instant case by the fact that there was nothing that the defendant *could* have done to cause the accident.

4. The Condition Requiring Exclusive Control in Defendant Is Satisfied.

The requirement of control is not an absolute one. The fact that the accident occurred sometime after Petitioner relinquished physical control of the instrumentality which caused the accident does not preclude application of the doctrine provided there is evidence that the instrumentality had not been improperly handled by Respondents' decedent or some third person or its condition otherwise changed after control was relinquished by Petitioner.

Zentz v. Coca-Cola Bottling Co., supra;

Nungary v. Pleasant Valley etc. Assn. (1956), 142 Cal. App. 2d 653, 300 P. 2d 285;

Burr v. Sherwin Williams Co. (1954), 42 Cal. 2d 682, 268 P. 2d 1041.

It is the control of the instrumentality by defendant at the time of the negligent act which satisfies the control element.

Rohar v. Osborne (1955), 133 Cal. App. 2d 345, 284 P. 2d 125;

Fields v. Oakland (1955), 137 Cal. App. 2d 602, 291 P. 2d 145;

Baker v. Goodrich Co. (1953), 115 Cal. App. 2d 221, 252 P. 2d 24;

Hoffing v. Coca Cola Bottling Co. (1948), 87 Cal. App. 2d 371, 197 P. 2d 50;

Escola v. Coca Cola Bottling Co. (1944), 24 Cal. 2d 453, 150 P. 2d 436;

Liggett and Myers Tobacco Co. v. De Lape (C. C. A. 9th, 1940), 109 F. 2d 598;

Michener v. Hutton (1928), 203 Cal. 604, 265 Pac. 238.

The evidence in this case is clear and without contradiction that the Petitioner had full physical control over the jet plane until the moment when Lt. Hughes climbed into the cockpit. He had physical control of the instrumentality only for a few minutes before the accident. After Lt. Hughes climbed into the cockpit and until the moment when the aircraft entered the obscuration at the far end of the airstrip there was no change in the condition of the aircraft.

There is no evidence that the pilot improperly handled the instrumentality. There is a presumption which is evidence in the case that he exercised all due care (Code Civ. Proc., Sec. 1963).

5. THE ACCIDENT COULD NOT HAVE BEEN DUE TO ANY VOLUNTARY ACTION OR CONTRIBUTION ON THE PART OF THE DECEASED PILOT.

Respondents agree that an element of the doctrine of *res ipsa loquitur* is lack of contribution. However, contribution is a question of fact to be resolved by the jury. (*Seneris v. Haas* (*supra*), p. 823 "We are of the opinion that the jury, under appropriate instructions, should have been permitted to determine whether each of the conditions necessary to bring into play the rule of *res ipsa loquitur* were present.")

The case at bar is not governed by the case of *Spencer v. Beatty Safeway Scaffold Co.* (1956), 141 Cal. App. 2d 875, 297 P. 2d 740. The distinction is that there was

affirmative evidence that Spencer contributed to the accident. The Court said:

> "As proof that negligence of respondents did not cause appellant to fall, it is recalled that he had for eight months been familiar with the method of operating the bleacher, and had been the chief actor in its operation. He had never discovered anything out of order. On the contrary, *he had abused the plyboard by standing on the lid which was not designed to support a man's weight.* Such practice may have caused a warping of the plyboard and thus have added to the friction of the cable and caused it to be immobilized." (P. 882.)

The record together with the disputable presumption of due care which Petitioner does not contend was rebutted permits "a reasonable inference that it (the aircraft) was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff. . . . ." *(Escola v. Coca-Cola Bottling Co.* (1944), 24 Cal. 2d 453, 458, 150 P. 2d 436.)

6. THERE WAS NO EVIDENCE OF POSSIBLE NON-NEGLIGENT PILOT ERROR.

Since there was substantial evidence that the accident was caused by mechanical failure, the jury could have so determined. To the extent that such a determination supports the verdict, it must be assumed on appeal that the jury did so decide.

In fact the Respondents' case insofar as it relates to evidence of mechanical failure can well rest right there. But Petitioner has listed supposed possibilities of pilot error. They are characterized as non-negligent because in the circumstances there is no evidence of pilot negli-

gence. Moreover, there is a presumption with the weight of affirmative evidence against negligence of the pilot and evidence to the contrary merely raises a question of fact which has been adversely resolved against Petitioner. Just to clear the atmosphere on this subject the contentions of Petitioner commencing at page 14 of its petition are treated seriatim.

(a) A pilot induced throttle burst is absolutely precluded because this never happens on take-offs [R. 471-472].

(b) The testimony is overwhelmingly to the effect that the pilot could not accidently cut the fuel supply and that to do so intentionally would be suicide [R. 474, 476, 478]. No such speculation can be indulged because of the presumption that the pilot acted with due respect for his own safety (Code Civ. Proc., Sec. 1961).

(c) The hypothesis that the pilot might "hit" the stick and move it in the wrong direction is preposterous. His life depends upon his hold on the stick and his experience was such as to eliminate any danger of a deliberate turn toward the ground. He was last seen with flaps and wheels up in proper attitude of climb [R. 564].

(d) Nothing more need be said about the experience of this pilot. There is no reason to suppose that the pilot took off on visual flight and switched to instruments, nor is it established beyond a jury question of fact that he lost visual contact with the ground at any point. At the same time it is equally consistent with the evidence to suppose that he was on instruments from start to finish and that his instruments were warmed up and perfectly functioning.

(e) As before pointed out the idea that the uncontradicted evidence establishes that the plane or the instruments were not properly warmed up is a mistaken notion.

(f) The evidence of the actuator setting is the theoretical result of laboratory paperwork and there is no testimony to the effect that the angle of impact compares with the supposed setting. No such comparison was attempted.

(g) The only bad thing about the weather was a fog bank at the far end of the runway and the pilot was airborne long before he reached the fog. The jet engine does not need a warm-up.

(h) There is no evidence that the pilot attempted to fly on visual contact or on instruments or of any switch from one to another. His clearance authorized either at his own election. Kinkella did not know or testify as to what this pilot did.

(i) The throttle is not a delicate instrument [R. 520] nor can it be accidentally cut [R. 476].

Generally speaking, the attempt of Petitioner to point to contributing causes of the accident has resulted in the rankest speculations and improbable suppositions. California law requires the question of contribution to the cause of an accident to be submitted to the jury in the same manner as any other question of fact. The jury's determination of this issue is as binding upon the trial court and on appeal as any other jury decision.

C. The Decision of the Court of Appeals Does Not Conflict With the Decisions of Other Circuits on the Application of Res Ipsa Loquitur.

In each of the cases from other circuits cited by Petitioner, the distinction lies in the fact that the Court is applying the law of another State which differs from the law of California.

In the case of *Morrison v. LeTourneau Co. of Georgia* (1943), 138 F. 2d 339, the Fifth Circuit, applying the law of Georgia, refused to apply the doctrine of *res ipsa loquitur* to an airline accident involving the crash-death of a pilot and his passenger. This case is contrary to the doctrine of *res ipsa loquitur* as applied in the State of California and the Ninth Circuit.

Parker v. Granger (1935), 4 Cal. 2d 668, 52 P. 2d 226;

Smith v. O'Donnell (1932), 215 Cal. 714, 12 P. 2d 933;

Boise Payette Lumber Co. v. Larsen (1954), 214 F. 2d 373 (Sustained jury verdict for plaintiff without any actual evidence of negligence and without reference to the doctrine);

Smith v. Alaska Airways (C. C. A. 9th, 1937), 89 F. 2d 253.

In the case of *Williams v. United States* (1955), 218 F. 2d 473, the Fifth Circuit said that under the law of Florida the doctrine was only applicable to cases involving circumstances which are within the common ordinary experience of most people. The case serves to exemplify that the law of Florida differs from the law of California, but it is of no further significance.

The difference between the law of California and the law of Wyoming appears in *Colin v. United Air Lines Trans. Co.* (1937), 17 Fed. Supp. 685, wherein the District Court states:

> ". . . the law tells us that the doctrine of *res ipsa loquitur* shall not be applied if there is any other reasonable or probable cause from which it might be inferred that there was no negligence at all."

D. The Verdict Was Fair and Just and Supported by Substantial Evidence.

This is in answer to Petitioner's Point IV, page 20 of the petition which is mainly a hodgepodge of other arguments which have already been answered above.

Petitioner reverts again to the case of *McPherson v. Buick Motor Co.*, 217 N. Y. 383, 11 N. E. 1050, and repeats a completely unsound argument made in the Court below by misconstruing this case. Petitioner seems to think that to recover against a manufacturer for negligence in producing an article which is inherently dangerous if carelessly made, it must be proved that the manufacturer knew that it was defective.

Obviously negligence is carelessness in not taking reasonable precautions to prevent defects, when reasonable care would have disclosed them. The uncontradicted evidence is that there was an "*electrical fire* in the assembly." Nothing was done about it except to put out the fire and clean off the foamite, leaving no evidence of fire. But the fact that it left the very defect which originally caused the fire and which caused another when Lieutenant Hughes took the plane into the air is a fair inference.

Any possibility of negligence of General Electric in manufacturing the jet engine is precluded. Petitioner put on experts to testify with convincing certainty that there was nothing wrong with the engine and this was uncontradicted. Such testimony was necessary as a part of Petitioner's defense because the engine was not a sealed unit which could not be disassembled for inspection without destroying it. Hence, the rule of *O'Rourke v. Day and Night Water Heater Co.* (1939), 31 Cal. App. 2d 364, is not in point.

Respondents offered the Court of Appeals a reasonable explanation of the accident which was supported by the evidence and reasonable inferences to be drawn therefrom. Respondents did not indulge in speculation nor did the Court of Appeals in its decision. The only element of speculation involved is whether the jury reconstructed the event of the accident in the same way as Respondents did or came to some other equally tenable conclusion from the evidence. The Court of Appeals clearly enough adopted the same approach.

It is well to bear in mind that the evidence on some important issues of fact was substantially conflicting. In such circumstances the Supreme Court has said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture." (that accident was impossible and must have been murder). "Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, *a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inferences.* Only when there is a complete absence of probative fact to support the

conclusion reached does a reviewable error appear. But when, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard as disbelief whatever facts are inconsistent with its conclusion, and the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis added.)

Lavender v. Kurn (1945), 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, 923.

Conclusion.

The object and purpose of the petition is to gain a review of the sufficiency of conflicting evidence to sustain the verdict. No question of public interest and importance is presented. The petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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